



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 14 2008

Robert K. Kelner, Esq.
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004

RE: MUR 5943
Paul Singer

Dear Mr. Kelner:

On October 9, 2007, the Federal Election Commission notified your client, Paul Singer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act").

On October 22, 2008, the Commission found, on the basis of the information in the complaint and information provided in response to the complaint, that there is no reason to believe Paul Singer violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Shana Broussard, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink that reads "Mark Allen".

Mark Allen
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT: Paul Singer**

MUR: 5943

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6 **I. INTRODUCTION**

7 This matter is based upon a complaint alleging that Presidential candidate Rudolph W.
8 “Rudy” Giuliani and the Rudy Giuliani Presidential Committee, Inc., and John H. Gross, in his
9 official capacity as treasurer (“Giuliani Committee”), violated the Federal Election Campaign
10 Act of 1971, as amended (“the Act”) by establishing, financing, maintaining and controlling a
11 newly-created Missouri limited liability corporation, Take Initiative America, LLC (“TIA”), for
12 the purpose of soliciting and receiving contributions in excess of federal limits to support a ballot
13 initiative measure in California. Specifically, the complaint alleges that the Giuliani Committee,
14 through its alleged agent, Paul Singer, solicited or directed contributions to TIA in excess of the
15 federal limits in violation of 2 U.S.C. § 441a, and solicited or directed contributions to TIA from
16 impermissible sources such as corporations or foreign entities in violation of 2 U.S.C. §§ 441b
17 and 441e.

18 **II. FACTUAL BACKGROUND**

19 On July 17, 2007, California resident Thomas Hiltachk submitted a ballot measure
20 entitled the “Presidential Election Reform Act” to the Attorney General of California to begin the
21 process of qualifying the measure for the June 2008 Primary ballot.¹ The ballot measure sought
22 to change the way the State of California allocates its presidential electors by apportioning

¹ To qualify the measure for the June 2008 ballot, supporters of the initiative needed to collect 434,000 signatures of registered California voters by November 13, 2007. Dan Morain, *GOP eyes California's electoral pie*, LOS ANGELES TIMES, August 6, 2007, at B-2.

electors according to the popular vote winner in each congressional district rather than the current statewide winner-take-all system. According to media reports, if the measure qualified for the June 2008 ballot and was approved by a majority of voters in the state, it would have gone into effect for the November 2008 general election, where it was expected to allocate a portion of California's fifty-five electoral votes. See Bill Schneider, *Republicans Want a Share of California Electoral Votes*, www.cnn.com, August 9, 2007; Carla Marinucci, *GOP-backed bid to reform state's electoral process folding*, SAN FRANCISCO CHRONICLE, Sept. 28, 2007.

On August 1, 2007, Hiltachk filed a statement of organization with the California Fair Political Practices Commission registering a state political committee, "Californians for Equal Representation" ("CER"), as a committee primarily formed to support the Presidential Election Reform Act. Available information indicates that in addition to Thomas Hiltachk, other CER organizers included Charles Bell, a partner in Hiltachk's law firm, Kevin Eckery, a Republican consultant, and Marty Wilson, a campaign strategist for Sen. John McCain's presidential committee. Between August 1 and September 10, 2007, CER reported receiving contributions totaling \$1,200 from three separate contributors. Then, on September 11, 2007, CER received a \$175,000 contribution that reportedly came from "TIA Take Initiative America, LLC" ("TIA").

According to its website, TIA is a not-for-profit organization engaged in promoting lower taxation and regulation on American jobs and taxpayers, defending employee paychecks from politics, reforming legal and educational systems, and ensuring greater voter participation. See <http://www.takeinitiativeamerica.org/inner.asp?z=1>. The group, which incorporated in the State of Missouri on September 10, 2007, has applied for recognition as a tax exempt organization under section 501(c)(4) of the Internal Revenue Code. According to the group's website, TIA

1 supports three projects, one of which is Californians for Equal Representation.² The TIA website
2 does not contain any information about the group's leaders, supporters, or funders and does not
3 mention any Federal candidates. However, incorporation documents filed with the State of
4 Missouri identify Charles Hurth of Union, Missouri as the corporation's organizer and registered
5 agent. TIA's tax exemption application form, also filed by Charles Hurth, lists Hurth as the sole
6 director and officer, and with respect to the organization's funding, states that:

7 Take Initiative America is funded exclusively through gifts and contributions
8 from its supporters. These supporters include both individuals and corporate
9 entities that support Take Initiative America goals. Although Take Initiative
10 America is a membership organization, its members are not currently required to
11 pay a set amount of dues.

12
13 The group's website does not contain any further information. One day after incorporating, TIA
14 made the \$175,000 contribution to CER.

15 Shortly after CER received the contribution from TIA, the media began questioning the
16 source of TIA's funds and whether TIA and CER were connected to the Giuliani campaign. The
17 Giuliani campaign denied any involvement with the ballot initiative, stating "[w]e are absolutely
18 not involved in that effort" and there is "no coordination between the Giuliani campaign and any
19 statewide effort." Carla Marinucci, *Mystery man's key role in move to change Electoral College*
20 *rules*, SAN FRANCISCO CHRONICLE, Sept. 27, 2007, at A-1. A Giuliani spokesman further stated
21 that "[t]his is completely independent from our campaign, and frankly, it's not an initiative that
22 serves our campaign's best interests." Carla Marinucci, *Giuliani backer was funder of state*
23 *electoral initiative*, SAN FRANCISCO CHRONICLE, September 29, 2007.

² The other two projects include an effort called "First Class Education" and an initiative entitled "Protecting Employees' Paychecks from Politics."

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1 When TIA refused to divulge the source of its funding, CER's main organizers –
2 Hiltachk, Eckery and Wilson – resigned and dissolved CER. Marinucci, *GOP-backed bid to*
3 *reform state's electoral process folding*. Upon announcing his resignation from the group on
4 September 28, 2007, Hiltachk called upon TIA to divulge the source of its funding, and
5 expressed dismay at TIA's failure to inform CER that it had been formed one day prior to making
6 the contribution. Eckery told the media: "There's no reason to be cute on campaign
7 contributions. We had nothing to hide and the public has every right to know." Dan Morain,
8 *GOP electoral initiative dealt major blows*, LOS ANGELES TIMES, September 28, 2007. CER,
9 which officially terminated on October 12, 2007, reported total contributions of \$198,172.80,
10 including the \$175,000 contribution from TIA.³ CER apparently used the funds to pay costs
11 associated with gathering signatures and did not refund most of the contributions after the group
12 folded.⁴ *See Morain, GOP electoral initiative dealt major blows.*

13 The day after CER's officers and key members resigned, hedge fund executive Paul
14 Singer came forward as the source of TIA's \$175,000 contribution to CER. Singer, who was
15 characterized by the media as a "Giuliani policy advisor" and "Giuliani's top fundraiser" issued a
16 statement contending that he contributed to TIA because he believes in proportional voting in the
17 Electoral College and denied that his contribution was connected to the Giuliani campaign.
18 Carla Marinucci, *Giuliani backer was funder of state electoral initiative*.

19 At the end of October 2007, the media reported that another group of individuals,
20 including former Giuliani campaign fundraiser Anne Dunsmore, attempted to revive the ballot
21 initiative effort by forming a group called California Counts. Steven Harmon, *Dems see plot in*

³ The group also reported receiving a \$28,000 in-kind contribution from a Sacramento public relations firm.

1 *electoral vote plan*, MEDIA NEWSGROUP, October 29, 2007. Singer denied any involvement with
2 the revived initiative effort. *Id.* Ultimately, neither committee gathered sufficient signatures to
3 qualify the initiative for the June 2008 ballot.

4 The complaint alleges that Paul Singer is an agent of Rudy Giuliani based upon Singer's
5 alleged roles as a policy advisor to Giuliani and Regional Finance Chair to the Giuliani
6 campaign. The complaint avers that as Giuliani's agent, Singer established, financed, maintained
7 or controlled TIA for the purpose of funding the "Presidential Election Reform Act" ballot
8 measure. As such, the complaint alleges that the \$175,000 contribution from Singer to TIA was
9 subject to, and far exceeded, the contribution limits of the Act or that, in the alternative, if the
10 funds came from Singer's company, may have violated the source prohibitions of the Act.

11 Singer's response avers that he made a \$250,000 donation to TIA in September 2007 on
12 his own behalf and from his personal funds with the expectation that TIA would use his money to
13 support Electoral College reform. From this contribution, TIA made the \$175,000 contribution
14 to CER. He claims that he was neither instructed nor encouraged by the Giuliani campaign to
15 make the contribution to TIA, nor did he represent to anyone that he was acting on behalf of
16 anyone but himself. Moreover, he contends that at the time he made his contribution to TIA, he
17 was no longer the "Eastern Regional Finance Chair," a volunteer position for the Giuliani
18 Committee that he held from approximately March to July 2007. However, after he relinquished
19 his fundraising role in July 2007, Singer remained associated with the Giuliani campaign as a
20 volunteer Middle East and Economic Policy Advisor. Singer claims that he heard about TIA
21 from a fellow former Giuliani fundraiser, Anne Dickerson, who became a fundraiser for TIA

⁴ CER's state disclosure reports indicate that it did actually refund \$6,482.20 to TIA on October 12, 2007, the day CER terminated.

after she left the Giuliani campaign. According to Singer, he never discussed the ballot initiative or TIA with Giuliani and never sought or received authorization to make the contribution to TIA and therefore was not acting as an agent on Giuliani's behalf.

III. LEGAL ANALYSIS

Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002) ("BCRA"), Federal candidates and officeholders, agents of Federal candidates and officeholders, or entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, Federal candidates or officeholders (collectively, "covered persons"), may not solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61. Nor may these covered persons solicit, receive, direct, transfer or spend funds in connection with an election other than an election for Federal office, unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. § 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62.

The Act and its implementing regulations are silent as to whether ballot initiatives are "in connection with an election" so as to be subject to the limitations under 2 U.S.C. § 441i(e)(1)(A) and (B). In recent MURs and Advisory Opinions, the Commission has split on the question of whether ballot initiatives can, under certain circumstances, be considered "in connection with an election." *See, e.g.*, Advisory Opinions 2007-28 (McCarthy/Nunez) and 2005-10 (Doolittle), and MUR 5367 (Issa). As discussed below, the available evidence indicates that Paul Singer was not acting as Giuliani's agent when he contributed to TIA.

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1 The available information indicates that Paul Singer was acting solely on his own behalf
2 – and not as an agent for Giuliani or the Giuliani Committee – when he made a \$250,000
3 contribution to TIA in September 2007. In implementing BCRA, the Commission defined
4 “agent,” as “any person who has actual authority, either express or implied,” to act on behalf of a
5 Federal candidate or officeholder. *See* 11 C.F.R. § 300.2(b). The Commission made clear that
6 under BCRA, an agent “does not apply to individuals who do not have any actual authority to act
7 on their [principal’s] behalf, but only ‘apparent authority’” to do so. Explanation and
8 Justification, 67 Fed. Reg. 49063, 49082 (July 29, 2002); *see also* Explanation and Justification,
9 71 Fed. Reg. 4975, 4977-4980 (Jan. 31, 2006). The Commission also made clear that a principal
10 may only be held liable under BCRA for the actions of an agent when the agent is acting on
11 behalf of the principal. *See* 61 Fed. Reg. at 49083. “[I]t is not enough that there is some
12 relationship or contact between the principal and agent; rather, the agent must be acting on behalf
13 of the principal to create potential liability for the principal. This additional requirement ensures
14 that liability will not attach due solely to the agency relationship, but only to the agent’s
15 performance of prohibited acts for the principal.” *Id.*

16 In this matter, the Giuliani Committee has presented information – in the form of a sworn
17 affidavit – that Singer was expressly informed that he was *not* authorized to act on behalf of the
18 Giuliani campaign when he contributed his own funds to TIA. Singer also explicitly stated that
19 he was acting on his own behalf and not for the Giuliani Committee when he made the \$250,000
20 contribution to TIA, and he further stated that he has never represented to anyone that he made
21 the donation on behalf of the Giuliani campaign. Although the complaint attempts to establish
22 that Singer had an agency relationship with the Giuliani Committee by virtue of his role as a
23 Regional Finance Chair and policy advisor for the committee, these contacts are not sufficient to

1 establish that Singer was acting on behalf of the Giuliani Committee when he made the
2 contribution. At the time Singer made the contribution to TIA in September 2007, Singer had
3 already been removed from his fundraising role three months earlier, and his role as policy
4 advisor did not include any activities related to fundraising. As such, it does not appear that Paul
5 Singer was an agent of the Giuliani Committee when he made the contribution to TIA.

6 Therefore, there is no reason to believe that Paul Singer violated the Act in connection
7 with the allegations contained in the complaint in this matter.

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